In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 509

THE CITY OF TACOMA, A Municipal Corporation,
Petitioner,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, and ROBERT SCHOETTLER, as Director of Fisheries, and JOHN A. BIGGS, as Director of Game, of the State of Washington, and THE STATE OF WASHINGTON, a Sovereign State,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR RESPONDENTS IN OPPOSITION

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STATE PRINTING PLANT, OLYMPIA, WASH.

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Respondents pray that the City of Tacoma's petition for a writ of certiorari be denied for the reason that no federal question exists in this case to invoke the jurisdiction of the United States supreme court, and the principle of law on which the supreme court of the State of Washington based its decision in this case, namely, the state's right to control its municipal subdivisions, is a well settled principle which has been consistently applied by the supreme court of the United States.

OPINION BELOW

The opinion of the supreme court of the State of Washington (No. 33706), which is sought to be reviewed in this case, is reported in the official Washington Reports (incorrectly cited in city's petition) in 49 Wn. (2d) 781, 307 P. (2d) 567 (1957) (Pet. App. A, pp. 1a-48a; R. 441-486, 555-557), and the petition for rehearing was denied in 49 Wn. (2d) 825, 307 P. (2d) 567 (1957) (Pet. App. F, p. 131a; R. 558).

LACK OF JURISDICTION—NO FEDERAL QUESTION

Contrary to petitioner's claim, there is no federal question by which the jurisdiction of this court may be invoked under 28 U. S. C. § 1257 (3). The validity of a federal statute was never drawn in question, nor was a federal title, right, privilege, or immunity specially set up or claimed in the state courts. The only question raised in this case concerns the character and the extent of the powers of a municipal corporation of the State of Washington, which is purely a question of local law.

We wish to call the court's attention to the fact that petitioner has failed to comply with United States Supreme Court Rule 23 (1) (f), as will hereinafter be shown.

STATUTES INVOLVED

Contrary to petitioner's claim on page 4 of its petition, § 21 of the Federal Power Act is not the statute involved in this case. The state supreme court did not even mention § 21 in its opinion, let alone hold it invalid. The court was only concerned with

petitioner's municipal powers and examined only the state statutes which are the source of such powers. In its opinion the court refers to RCW 8.12.030, RCW 80.40.010, and other state statutes to which its attention had been drawn. (Pet. App. A, pp. 17a-18a; R. 459.) These statutes are too lengthy to set forth in this brief and are not necessary to this court's disposition of the case. It is sufficient to say that they neither permit the City of Tacoma to condemn state land previously dedicated to a public use, nor to receive a federal grant of condemnation power to condemn such land.

QUESTION PRESENTED

May the State of Washington enjoin its own municipal corporation from condemning state land previously dedicated to public use, when such municipal corporation does not have the inherent power from its creator (1) to condemn such land, or (2) to receive a grant of federal condemnation powers?

The question which petitioner claims is a federal question was stated by the Washington state supreme court, as a subsidiary question, in specific terms as follows (Pet. App. A, p. 18a; R. 459):

> "* * * specifically, can the city of Tacome *receive* the power and capacity to condemn state-owned lands previously dedicated to a publice use, from the license issued to it by the Federal power commission in the absence of such power and capacity under state statutes?" (Emphasis supplied.).

The court did not question the right of Congress to *grant* eminent domain powers. It merely questioned

the inherent power of the City of Tacoma to *receive* or *accept* such a grant.

SUPPLEMENTAL STATEMENT OF THE CASE

We only agree with the chronological order of the steps taken in the history of this litigation as petitioner has related them. There are, however, a number of comments that are badly slanted and a warped picture of the proceedings is given. Petitioner is argumentative and does not state the facts objectively. Further, petitioner has included much immaterial matter, including matter outside the record, and has failed to include other matters we deem material.

The prior cases in the history of this litigation cited by petitioner are not before this court for review. Suffice it to say, that after issues were joined and a trial had on the merits—and this did not occur until the instant case sought to be reviewed—the supreme court of the State of Washington found that Tacoma, one of the state's municipal subdivisions, proposed to acquire by eminent domain, for a proprietary function, property its sovereign state had many years previously dedicated to a governmental use. This the court held Tacoma could not do. The question presented is not a federal one—it is peculiarly a state one.

Following this decision, the City of Tacoma, petitioner herein, had introduced before the state legislature Substitute Senate Bill 264 which would have authorized it to condemn the necessary state land in question (R. 518). The bill was defeated indicating that the legislature of the State of Washington does not intend to give its municipality, the City of Tacoma,

the power to either condemn its state lands or to receive such power from the federal government.

In reviewing the history of this litigation, petitioner has failed to call the court's attention to another action which has an important bearing on this case. In 1955, the City of Tacoma brought an action in federal court, western district of Washington, against the sovereign State of Washington and others, involving the instant license, to condemn certain parcels of public and private property under § 21 of the Federal Power Act. *City of Tacoma v. Severns, et al., State of Washington, et al.*, U.S.D.C. (W.D.S.D.) No. 1892 (R. 160 A-160 B). The court dismissed the action on the ground that the City of Tacoma did not have authority under state law to bring an action in federal court under § 21 of the Federal Power Act.

REASONS FOR DENYING WRIT

A—FEDERAL QUESTION NOT PROPERLY PRESENTED

Even if there were a federal question in this case, a contention with which we do not agree, the petition must comply with the provisions of United States Supreme Court Rule 23 (1) (f), which provides in part:

> "If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e. g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions

of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e. g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

The petition in this cause is fatally defective in that it does not disclose the stage in the proceedings or the manner in which the alleged federal question was raised; nor does it show the method of raising it and the way it was passed upon by the court, with pertinent quotations and references. A federal question was not even raised by petitioner in its pleadings. We deem these matters to be jurisdictional.

B—NO FEDERAL QUESTION

By way of introduction this court should keep in mind the following well settled principles of law which govern this court.

The powers of municipal corporations are derived solely from the state of their creation, through the legislature, and such powers may be enlarged, abridged, or entirely withdrawn by the state legislature at its pleasure. This absolute right to exclusively control their respective municipal corporations is reserved to the states under the tenth amendment to the United States constitution. The tenth amendment is the supreme law of the land and is just as controlling in its field as the commerce clause is in its field. In *City of Trenton v. New Jersey* (N. J. 1922), 262 U. S. 182, 187, the court said:

"* * * A municipality is merely a department of the state, and the state may withhold, grant, or withdraw powers and privileges, as it sees fit. However great or small its sphere of action, it remains the creature of the state, exercising and holding powers and privileges subject to the sovereign will [Citing case.]"*.

In *U. S. ex rel. Moses v. City Council of Keokuk* (Ia. 1867), 6 Wall. (U.S.) 514, 516, this court held that "it is quite clear" that all the rights, duties, and obligations of a municipal corporation must be ascertained and defined by the laws of the state of its creation.

This court is bound by the decisions of the highest courts of the states as to the powers of their municipalities, and it will not review such nonfederal questions. *Chicago v. Fieldcrest Dairies* (Ill. 1941), 316 U.S. 168, 171-173, 86 L. ed. 1355, 1357-1358, 62 S. Ct. 986.†

In *Southwestern Bell Telephone Co. v. Oklahoma* (Okla. 1938), 303 U.S. 206, 212-213, this court prescribed the following rule to be followed when reviewing state court decisions:

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* In accord are *Joslin v. Providence* (R.I. 1922), 262 U.S. 668, 674; *Southern Iowa Electric Co. v. Chariton* (Ia. 1920), 255 U.S. 539, 546; *Williams v. Eggleston* (Conn. 1897), 170 U.S. 304, 310; *Laramie County v. Albany County* (Wyo. 1875), 92 U.S. 307, 307; *Barnes v. District of Columbia* (D.C. 1875), 91 U.S. 540. 544-545; *Rogers v. City of Burlington* (Ia. 1865), 3 Wall. (U.S.) 654.

† In accord are *Railroad Commission v. Los Angeles R. Corp.* (Cal. 1929), 280 U.S. 145, 152, 74 L. ed. 234, 310, 50 S. Ct. 71; *Georgia Railway & Power Co. v. Decater* (Ga. 1922), 262 U.S. 432, 438; *St. Louis & K.C. Land Company v. Kansas City* (Mo. 1915), 241 U.S. 419, 427; *Old Colony Trust Co. v. Omaha* (Neb. 1912), 230 U.S. 100, 116; *Fischer v. St. Louis* (Mo. 1904), 194 U.S. 361, 369-370; *Schefe v. St. Louis* (Mo. 1904), 194 U.S. 373.

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it. [Citing cases.]"

The following quotations from the state court decision sought to be reviewed should convince this court that not only was there no federal question presented or decided by the state court, but a decision based thereon was not necessary to the determination of the cause. After holding that petitioner was not authorized to condemn state land previously dedicated to a public use, the court considered the subsidiary question of whether petitioner could receive that power under its federal license. Following the statement of this question, the court continued:

> "This is not a question of the right of the Federal government to control all phases of activity on navigable streams, nor a question of its power, under the Federal power act, to delegate that right. It only questions the capacity of a municipal corporation of this state to act under such license when its exercise requires the condemnation of state-owned property dedicated to a public use." (Pet. App. A, p. 18a; R. 459.)

After pointing out that the question of the legal capacity of the City of Tacoma to act under the license issued by the federal power commission was specifically

excluded from consideration by the ninth circuit court of appeals, the state supreme court continued:

> "Hence, this case is not *res judicata* against the state of Washington. As we have heretofore pointed out, the city does not have the capacity to act under the license. Its inability to act, in the manner which we have discussed, is inherent in its very nature. *Its inability so to act can be remedied only by state legislation that expands its capacity.*" (Court's emphasis.) (Pet. App. A, p. 19a; R. 460.)

The court then distinguished the instant case from the *First Iowa* case and concluded with the following:

> "In the instant case, the subject matter—the inherent inability of the city to condemn state lands dedicated to a public use—does not present a question of *state statutory prohibition*; it presents a question of *lack of state statutory power* in the city. It does not present a Federal question; it presents a question peculiarly within the jurisdiction of the state of Washington." (Court's emphasis.) (Pet. App. A, p. 20a; R. 461.)

Since the state court concluded that it was not deciding any federal question, this court should abide by that conclusion also. In *Herb v. Pitcairn* (Ill. 1945), 324 U.S. 117, 128, this court said:

> "It is our purpose scrupulously to observe the long standing rule that we will not review a judgment of a state court that rests on an adequate and independent ground in state law. * * *"*

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* See also *Black v. Cutter Laboratories* (Cal. 1956), 351 U.S. 292, 298; *Dibble v. Bellingham Bay Land Co.* (Wash. 1895), 163 U.S. 63, 69.

ARGUMENT IN ANSWER TO PETITIONER

On pages 14 through 23 of its petition, the city presents its argument for granting the writ under four headings. Without repeating the headings, we will refer to them by number and answer each one in numerical order.

1. Petitioner has been deprived of no federal right. The question is not whether Congress can *grant* eminent domain powers, but whether petitioner is authorized to *receive* them.

2. The state court's decision sought to be reviewed here does not conflict with *First Iowa Hydroelectric Coop. v. Federal Power Commission* (Ia. 1946), 328 U.S. 152. That case involved a police power measure and not an exercise of a state's control over its subordinate units of government.

3. None of the cases cited by petitioner on pages 17-22 are in point. As to petitioner's first principle, we agree that an agent of the federal government can build a dam on a navigable stream if the source of its power permits it to do so. Tacoma is an agent of the State of Washington and not of the federal government. The state supreme court has held that neither its charter nor the state statutes which are the source of its municipal powers authorize Tacoma to build the Cowlitz project according to the plan set forth in its ordinance No. 14386, as amended.

Directly in point are the two companion cases of *McGuinn, et al. v. City of High Point*, 217 N.C. 449, 8 S.E. (2d) 462 (1940), and *Yadkin County v. City of High Point*, 217 N.C. 462, 8 S.E. (2d) 470 (1940). See also *Driscoll v. Burlington-Bristol Bridge Co.*, 8

N.J. 433, 86 A. (2d) 201, 229 (1952), cert. den. 344 U.S. 838, reh. den. 344 U.S. 888, wherein the late Chief Justice Vanderbilt, of the New Jersey supreme court, said:

> "* * * Quite obviously the Federal Government cannot grant a power to an agency of the State which the State itself has not seen fit to grant. * * *"

The foregoing proposition was upheld in *Burlington County Bridge Commission v. Meyner*, 133 F. Supp. 214 (1955). In addition, see Judge Boldt's opinion in *City of Tacoma v. Severns, et al., State of Washington, et al.*, U.S.D.C. (W.D.S.D.) No. 1892, *supra* (R. 160 A-160B), wherein he said (R. 160B):

> "The federal government does not have authority to remove limitations on the powers of Washington cities expressly provided by the Legislature of that sovereign state. Accordingly, Section 814 of the Federal Power Act (Title 16 U.S.C.A.), which grants the right of eminent domain in district courts of the United States to licensees of the Federal Power Commission, does not remove or affect the limitations of the condemnation powers of Washington cities."

As to petitioner's second principle, regardless of whether the federal government may do so or not, a municipality created by a sovereign state cannot condemn the land of such state without its consent, since this would permit a municipality to destroy the very sovereign which created it.

None of the cases cited under petitioner's third, fourth and fifth principles are in point. In none of these cases was the parent state objecting that its

municipality was acting *ultra vires*, as is the case here, nor was the inherent power of a corporation, under its charter and laws of its creation, to receive or accept a grant of federal condemnation powers in issue. In some of the cases the question was whether Congress had authority under the constitution to *grant* eminent domain powers, but no question was ever raised as to the power of the grantee to *receive* them. In fact, the case of *Latinette v. City of St. Louis*, 201 Fed. 676, 677 (7th Cir. 1912), strongly relied upon by petitioner, illustrates this point. In that case the court expressly found that it was settled beyond controversy that Missouri by her statutes and decisions had authorized St. Louis "to accept a federal grant of right to appropriate lands in Illinois." The only question before the court was the power of the federal government to make such a grant. If St. Louis, on the other hand, had attempted to condemn land in its parent state of Missouri, without that state's consent, the result of the case would necessarily have been different.

4. Petitioner fails in its attempt to create an important question of federal-state relationship.

The state decision acknowledges that the dam may be built by any agency capable of receiving the power.

The suggestion that the sovereign state might acquire land for the express purpose of preventing petitioner from proceeding under its federal license is unworthy and not justified by the record. The state fish hatchery involved was in existence for many years prior to petitioner's declaration of intention to build.

Petitioner refers to its broad powers under state law and implies that the state court incorrectly de-

cided a question of state law. There is here no federal question. In holding that petitioner, a creature of the state, could not condemn the property of its creator, the sovereign, without being granted the power so to do by its creator, the court below was correct.

CONCLUSION

The decision below is clearly correct. There is no conflict of decision. There is no important question of federal law, and it is submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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